IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4187 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SHAIKH ASIABIBI USMANGANI

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 4187 of 2004

Mr. P.M. Thakkar, Senior Advocate, with
MR PRADEEP PATEL for Petitioner No. 1-5
Miss. Mita S. Panchal, Assistant Government Pleader,
for Respondent No. 1-2
MR MITUL K SHELAT for Respondent No. 3
MR AR MAJMUDAR for Respondent No. 4

CORAM : HON'BLE MR.JUSTICE K.M.MEHTA

Date of decision: 06/07/2004

C.A.V. JUDGEMENT

1. Shaikh Asiabibi Usmangani and others, petitioners, have filed this petition before this Court under Article 226 of the Constitution of India with a prayer that this Court may issue a writ, order or direction in the nature of mandamus quashing and setting aside the communication dated 8.8.2003 issued by the Assistant Director, Indian Medical & Homeopathy Board, Gandhinagar, which is at Annexure "F" to the petition. By the impugned communication, the respondent No.1 stated that the admission of the petitioners in the Degree Course in Homeopathy known as Bachelor of Homeopathy Medicine and Surgery ('B.H.M.S') with the respondent No.4-College for the Academic Year 2002-03, on NRI (Non-Resident Indian) seats or NRI sponsored seats, is cancelled as their admission is contrary to the instructions issued by the Government earlier in this behalf. It is the case of the petitioners that the impugned order dated 8.8.2003 is contrary to the judgment of the Supreme Court in T.M.A. Pai Foundation vs State of Karnataka reported in [2002] 8 SCC p.481. The petitioners have, therefore, prayed that the impugned action of the respondents-Authorities be declared as illegal, mala fide, arbitrary and violative of Article 14 of the Constitution of India. The petitioners have further prayed that this Court may be pleased to direct the Registrar, North Gujarat University, to enroll the petitioners as students of North Gujarat University, Patan, take their examination and, thereafter, declare the results of B.H.M.S. Degree Court of the petitioners who are given admission in the respondent No.4-College on NRI/NRI sponsored seats for the Academic Year 2002-2003. The petitioners have further submitted that the resolution dated 8.8.2003 is also violative of rules of natural justice.

2. The facts giving rise to the present writ petition are as under:

2.1 The petitioners are students in the age group of 18 to 19 years who on aspiring to pursue five and half years degree course in Homeopathy known as B.H.M.S., applied to Baroda Homeopathy Medical College, to grant them admission on successfully clearing their 12th Standard Higher Secondary Certificate Examination conducted in the month of March/April 2002. It is the case of the petitioners that the Baroda Homeopathy Medical College is recognized by the Central Council of Homeopathy, New Delhi, and affiliated to the North Gujarat University, Patan. It is the case of the petitioners that the petitioners were admitted to the course on seats reserved for NRI or NRI sponsored

candidates where the concerned Management was having exclusive right to grant admission to the students. The petitioners have annexed a statement in which it has been indicated that the petitioners are pursuing their studies since 18.11.2002. The petitioners have applied to the respondent No.4-College and they were given admission in the first year degree course during October 2002 and the academic term of course in which the petitioners are admitted commenced from 18.11.2002 and out of 5.1/2 years duration, period of one and half years is already completed making them entitled to take annual examination starting from 7.4.2004. The petitioners have prosecuted their studies in the first year degree course and all of them have required number of days of attendance. The respondent No.4-College forwarded the names of the petitioners to the respondent No.3-University for the purpose of enrolment with the University. However, the respondent No.3-University has refused to enrol the names of the petitioners and returned the forms to the respondent No.4-College saying that, admissions given to the petitioners are not as per the rules according to the Government communication dated 8.8.2003.

3. The petitioners submitted that, in an identical matter, this Court (Coram: A.R.Dave, J.), in Special Civil Application No.4687 of 2003, in the case of Soni Daxesh Ashwinbhai vs. State of Gujarat, by order dated 21.4.2003, admitted the said writ petition and granted interim relief to the students who are similarly situated. The petitioners have relied upon the aforesaid order.

4 The petitioners have contended that the resolution dated 8.8.2003, by which the petitioners were denied admission in the course of B.H.M.S. in the respondent No.4-College, refers to the earlier resolution dated 7.12.1999 and another resolution dated 5.9.2002. The resolution . dated 7.12.1999 stipulates two conditions for grant of admission by the college management on NRI seats, namely:
(1) Management will be entitled to charge only US 2000 (two thousand) dollars from the student seeking admission on NRI seat,
and
(2) the decision to give admission on NRI or NRI sponsored student will be taken by three member committee consisting of (a) Principal of the College concerned, (b) Trustee of the Trust and (c) Director of the Indian System of Medicine and Homeopathy.

4.1 It may be noted that, while passing the

resolution dated 7.12.1999, the Government relied upon the the judgment of the Apex Court in the case of Unni Krishnan J.P. vs. State of AP, reported in AIR 1993 Supreme Court 2178, and the order dated 15.12.1998 passed by this Court (Coram: K.R. Vyas, J.) in Special Civil Application No.9942 of 1998 in the case of Parul Arya Seva Mandli vs. State of Gujarat.

4.2 It is the case of the petitioners that the judgment of the Apex Court in Unni Krishnan (supra) has been overruled by the larger bench of the Supreme Court in the case of T.M.A. Pai Foundation (supra) and the same has been again followed by the Supreme Court in Islamic Academy of Education and another vs. State of Karnataka and others, reported in (2003) 6 Supreme Court Cases 697 and, therefore, the whole basis of the resolutions dated 7.12.1991 and 8.8.2003 vanishes and, therefore, the impugned action of the Government is bad in law.

4.3 In this view of the matter and in view of the order dated 21.4.2003 passed by this Court (Coram: A.R.Dave, J.), in Special Civil Application No.4687 of 2003, in the case of Soni Daxesh Ashwinbhai vs. State of Gujarat, this Court has admitted the matter and granted interim relief.

5 The petitioners have filed an amendment on 4.5.2004. In the said amendment, the petitioners have also raised contention that the impugned order dated 8.8.2003 passed by the Government is bad in law on the ground that the Government has not afforded an opportunity of hearing to the petitioners as well as College authorities. They have relied upon the judgment of the Supreme Court in the case of D.K.Yadav vs. J.M. A. Industries Limited, reported in 1993 (3) SCC 259 and other judgments in this behalf. The petitioners have also contended that the impugned order passed by the Government does not give any reasons and therefore it is vitiated. The petitioners have also relied upon various judgments in this behalf. The said amendment is granted by this Court and the petitioners have carried out the said amendment. The State Government has not filed any reply to the amendment filed by the petitioners. The State Government has also not submitted any written submission against the written submission tendered by the petitioners.

6. Learned Senior Advocate, Mr. P.M.Thakker, appearing on behalf of learned advocate Mr. Pradeep Patel, for the petitioners, has made following

submissions and invited the Court's attention to certain salient features in this behalf.

6.1 It is the case of the petitioners that the Government of Gujarat pursuant to the judgment of the Apex Court in the case of Unni Krishnan (supra) decided to regulate the procedure of admission by appointing three member separate committee for each college consisting of (i) Principal of the College concerned (ii) Managing Trustee of the Trust running the college and (iii) officer appointed by the State Government. The advertisement used to be given in the newspapers inviting applications from all the students of science stream who are meeting with the eligibility criteria fixed by the Central Council of Homeopathy, New Delhi, being the apex body authorized to lay down the eligibility criteria for admission in the first year degree course in Homeopathy Science.

6.2. The learned advocate for the petitioners has submitted that, after release of the advertisement and receipt of application forms from the 12th pass students, provisional admission as per eligibility used to be given to the students in respective self finance Homeopathy Colleges subject to the approval of the three member committee for each college. It is the case of the petitioners that the constitution of the committee was delayed every year due to late nomination of a member by the State Government. However, the fact remains that every year three member committee in each college used to finalise the admission given in Homeopathy Medical College according to the merit of marks obtained by each student.

6.3 Learned advocate for the petitioners submitted that a Public Interest Litigation, being Special Civil Application No.4087 of 1997, in the case of National Students Union of India vs. State of Gujarat, was filed before this Court. In that case, the Division Bench of this Court (Coram: the Acting CJ R.A. Mehta and Mr. Justice N.N. Mathur), by order dated 8.7.1997, in paragraph 4, directed that the admissions will be granted only by the Committee comprising of three members as appointed and only the candidates selected by the said Committee shall be admitted. The learned advocate for the petitioners submitted that this order was confined only to 85% of seats and not for 15% NRI seats as per the order of this Court (Coram: K.R.Vyas, J.). It is further submitted that a Government Resolution was also issued on 7.12.1999, wherein, a Committee of three members was appointed in this behalf.

7. The petitioners submit that, until 1998, no management of any self finance college thought it necessary to fill up few seats from amongst NRI or NRI sponsored students charging different amount of fee as per the decision of the Supreme Court. It is the case of the petitioners that even otherwise so many seats used to remain vacant on charging regular fee prescribed by the State Government for free seats and payment seats. However, a petition came to be filed by the Homeopathy College Management before this Court being Special Civil Application No.9942 of 1998 praying before this Court to direct the respondent-State Government to allocate and allow the management of Homeopathy College to fill up 15% seats of total intake capacity as was done in case of other faculties in higher education pursuant to the decision of the Apex Court in the case of Unni Krishnan (supra) and further interim orders passed in the case of T.M.A. Pai Foundation (supra).

7.1 The petitioners submit that, accordingly, this Court (Coram: K.R. Vyas, J.) passed an order on 15.12.1998 in Special Civil Application No.9942 of 1998 in the case of Parul Arya Seva Mandli vs. State of Gujarat. The learned single Judge of this Court, relying upon the judgment of the Apex Court in the case of Unni Krishnan (supra) and further interim orders passed by the Apex Court on 14.5.1993 in this behalf, has observed in page 3 as under:

7.1.A. "In view of this direction, it is clear that the management of the institution is required to admit the NRI students by fixing the quota for that at 15%.There is no dispute to the fact that the main petition is pending in the Supreme Court and even for the subsequent year also, the management have complied with the direction of the Supreme Court by fixing 15% quota to the NRI students. In this view of the matter, the petitioner is justified in making reservation of 15% seats for NRI students or NRI Sponsored seats in the colleges run by the petitioner."

7.2 After referring to the judgment of the Supreme Court in Unni Krishnan (supra) and also above judgment of this Court in other matters, the State Government issued a G.R. dated 7.12.1999 stipulating two conditions for grant of admission by the college management on NRI seats which I have already referred to above.

7.3 The petitioners submit that, in case of giving admission to the students on NRI seats, the advertisement was given in the newspaper by the respective management

inviting application from students willing to take admission on NRI or NRI sponsored seats. The college managements used to give provisional admission to the students subject to approval of the three member committee. In no case, where admissions were given on NRI seats, the committee could be constituted before one year to finalise admissions. It is the case of the petitioners that delay used to occur due to late nomination of a member by the State Government. However, the fact remains that, all the admissions given in Homeopathy College until 2001 on NRI or NRI sponsored seats were sanctioned by the three member committee.

7.4 The petitioners submit that because of the orders passed by this Court in two writ petitions under different subject matters, from the year 1999, all Homeopathy Colleges were included under centralized admission system for the purpose of giving admission in the Homeopathy Medical Colleges. The State Government decided to keep 50% seats as free seats and 50% seats as payment seats out of total seats sanctioned by the Central Council of Homeopathy for giving admission in the first year degree course. The State Government, however, continued to allot every Homeopathy College 15% seats out of 50% seats earmarked as payment seats depending upon the intake capacity of each college. The permission was granted to the Homeopathy Colleges as per GR dated 7.12.1999 for filling up 15% seats from NRI or NRI sponsored students and the same was extended till further order vide GR dated 3.6.2000.

7.5 The petitioners submit that Homeopathy Colleges were required to follow same procedure as prescribed in GR dated 7.12.1999 for the purpose of giving admission on NRI seats as per the eligibility criteria fixed by the State Government. After adoption of centralized admission system for the purpose of giving admission to the students in Homeopathy Colleges along with other faculties, the college management used to give advertisement in newspaper inviting applications from the students seeking admission on NRI or NRI sponsored seats. In the present case also, the college management gave advertisement in the newspaper for giving admission on NRI or NRI sponsored seats, and, pursuant thereto, the petitioners applied for admission in the college and the same was granted to them.

7.6 The petitioners submit that prior to completion of one year or at time more, that the Committee could not be constituted to finalise the admission given on NRI seats. The delay if any in constitution of three member

committee was due to inaction on the part of the State Government to nominate one member for the committee of three members according to condition No.2 of GR dated 7.12.1999. However, the fact remains that even after including the Homeopathy Colleges under centralized admission system, the three member committee sanctioned and finalized all provisional admissions given on NRI seats by respective college managements for the purpose of enrolment of the students with the concerned University.

7.7 The petitioners submit that after 1999 and until 2001, 85% seats of each college were filled under centralized admissions system and 15% seats were filled by the Management as NRI quota seats and that, Homeopathy College in which the petitioners are given admission was included in the scheme. The State Government has not framed any separate rules for giving admission to the students in the faculty of Homeopathy Science and, hence, as per the resolution of the Government, the admission process was undertaken.

7.8 The petitioners submit that the admission procedure for giving admission on 85 seats (as intake capacity of the college in which the petitioners are given admission is 100 seats) started somewhere in the month of September 2002 and completed in the month of January 2003. On remaining 15% NRI or NRI sponsored seats, the petitioners took admission in the Baroda Homeopathy Medical College and, since then, the petitioners are regularly prosecuting their studies.

7.9 The petitioners submit that, as per the prevalent practice in each Homeopathy Medical College for taking decision to give admission on NRI seats, a Committee was required to be constituted for approving the provisional admission given by the college. The college management forwarded a list containing the names of the petitioners who were given admission on NRI seats, as required by the State Government. The Director of Education requested the College to forward the list as per the format attached to the said letter. Pursuant to that, the Principal of the college also addressed a letter to the Director of Education dated 31.12.2003 giving details of admission for the year 2002-03. A copy of the said letter dated 31.12.2002 is at Annexure "E" to the petition.

7.10 The petitioners submit that, in view of these

correspondence, the matter was closely pursued by the college management to finalise the admission given to the petitioners. Neither name nor member to represent the State Government on the committee as member according to GR of 1999 was conveyed to the Institution and the issue remained unfinalised.

7.11 The petitioners were shocked and surprised when the Director of Education addressed communication dated 8.8.2003 and directed the College to communicate the decision to the petitioners. It may be noted that, by the said communication, the State Government took decision not to approve admission given to the petitioners. The concerned North Gujarat University was also asked not to enrol the names of the petitioners with the University and, accordingly, the University has also refused to enroll the name of the petitioners with the University. A copy of the said letter dated 8.8.2003 is at Annexure "F" to the petition. Being aggrieved by the impugned order/communication dated 8.8.2003, Annexure "F", the petitioners have filed the present petition before this Court challenging the said communication.

8. The learned Senior Advocate, Mr. P.M.Thakker, for the petitioners, has contended that the impugned order dated 8.8.2003 is bad in the eye of law because it is violative of principles of natural justice.

8.1. It is further submitted that the impugned communication/order dated 8.8.2003 is passed without giving any opportunity of hearing to the petitioners who are vitally affected persons. In support of the same, the petitioners relied upon the judgment of the Supreme Court in the case of D.K.Yadav vs. J.M. A. Industries Limited, reported in 1993 (3) SCC 259 and the principle laid down therein has been reiterated in other decisions in the case of Bhagwan Shukla vs. Union of India and others, reported in AIR 1994 SC 2480, in the case of State Bank of Patiala vs. K. Sharma, reported in AIR 1996 SC 1669, in the case of Canara Bank and others vs. Debasis Das and others, reported in (2003) 4 SCC 557, and in the case of Union of India and another vs. GTC Industries Limited, Mumbai, reported in (2003) 5 SCC 106.

8.1.A The Supreme Court in the case of D.K. Yadav (supra), in paragraph 12, page 269, observed as under:
"12. Therefore, fair play in action requires that the procedure adopted must be just, fair and reasonable. The manner of exercise of the power and its impact on the rights of the person affected would be in conformity with

the principles of natural justice. Article 21 clubs life with liberty, dignity of person with means of livelihood without which the glorious content of dignity of person would be reduced to animal existence. When it is interpreted that the colour and content of procedure established by law must be in conformity with the minimum fairness and processual justice, it would relieve legislative callousness, despising opportunity of being heard and fair opportunities of defence. Article 14 has a pervasive processual potency and versatile quality, equalitarian in its soul and allergic to discriminatory dictates. Equality is the antithesis of arbitrariness. It is, thereby, conclusively held by this Court that the principles of natural justice are part of Article 14 and the procedure prescribed by law must be just, fair and reasonable."

8.1.B The Supreme Court in the case of Canara Bank and others vs. Debasis Das and others, reported in (2003) 4 SCC 557, in paragraphs 13, 14, and 19, observed as under:

8.1.B.(i) "13. Natural justice is another name for common-sense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common-sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form.

8.1.B.(ii) 14. The expressions 'natural justice' and 'legal justice' do not present a watertight classification. It is the substance of justice which is to be secured by both, and whenever legal justice fails to achieve this solemn purpose, natural justice is called in aid of legal justice. Natural justice relieves legal justice from unnecessary technicality, grammatical pedantry or logical prevarication. It supplies the omissions of a formulated law. As Lord Buckmaster said, no form or procedure should ever be permitted to exclude the presentation of a litigant's defence.

18.1.B.(iii) 9. Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder.

They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the facts and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. The expression 'civil consequences' encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life."

8.1.C It is submitted that the aforesaid principle has also been reiterated by this Court in the judgments in the case of Shankerlal Nagardas Patel vs. Taluka Development Officer, reported in 1997 (1) GLR 793 and in the case of Indrajit Ratilal Shah vs. Jambusar Nagar Panchayat and others, reported in 1998 (1) GCD 730. It is submitted that the impugned order/communication dated 8.8.2003 is passed by the respondent No.1 without authority of law, statute, rule or any enactment framed by the State Government. The impugned order is purported to have been passed under the Government Resolution dated 7.12.1999. Clause 2 of the Government Resolution stipulates action to be taken by three member committee. The impugned order is not passed by three member committee but the same is passed by a single member of the committee in the present case. Therefore, the impugned order/communication dated 8.8.2003 is without jurisdiction, patently illegal and deserves to be quashed and set aside.

8.2 It is the further case of the petitioners that the petitioners applied for these 15% seats in the year 2002 and they were given provisional admission by the respondent No.4 until committee of three members sit together to finalise the admission. The respondents Nos. 1 and 2 did not send a member to represent the Government in the committee of three members and the petitioners continued to get coaching in the college. The ultimate decision to grant or refuse to grant the admission was required to be taken by the committee of three members after hearing the petitioners. The respondent No.3 had no independent authority to grant or cancel the admission given to the petitioners. Nevertheless, the respondent No.1 usurped the power and passed totally non-speaking

order dated 8.8.2003 cancelling the admission granted to the petitioners without giving any opportunity of hearing to the petitioners or even to the college management due to which the respondent No.3 refused to enroll the petitioners.

8.3 The learned advocate for the petitioners has also relied upon the order dated 21.4.2003 passed by this Court (Coram: A.R.Dave, J.) in Special Civil Application No.4684 of 2003 wherein this Court has observed as under:

8.3.(i) "Looking to the fact that the petitioners have already studied for one complete academic term and they have been given admission as observed by the Honourable Supreme Court in the judgment referred to hereinabove, in my opinion, at this stage, it would not be proper to restrain the petitioners from appearing at the examination in question. It is therefore directed that the petitioners shall be permitted to appear at the examination in question and their result shall be subject to final order which might be passed by this Court in this petition."

The State Government has not challenged the aforesaid order. In fact, the State Government has acquiecsed in the said order.

8.4 The petitioners have further relied upon the judgment of the Supreme Court in the case of S.N. Mukherjee vs. Union of India, reported in, AIR 1990 Supreme Court 1984, and the judgments of this Court in the cases of Laxmidas Mohanlal Patel vs. State of Gujarat, reported in (2002) 3 GCD 1834; Univac Corporation vs. Union of India and others reported in 1993 [1] GCD 491; Diwan Kalusha Ahmedsha and others vs. Mr. Vanikar, Collector of Kaira, reported in 1970 GLR 1009; and The Texteels Ltd vs. N.M. Desai, reported in 1969 GLR 622, wherein the Court has taken a view that every administrative or quasi judicial order should be a speaking order and it must contain reasons for arriving at a particular conclusion. The petitioners, therefore, relied upon the ratio of decision rendered by the Supreme Court and this Court and submitted that the impugned order/communication dated 8.8.2003 is not only passed in violation of principles of natural justice, but the same is totally a non-speaking order which has visited upon the petitioners as civil consequences and the same may be quashed and set aside.

8.4.A. The petitioners have further contended that that view of the matter the respondent No.1 has no power or jurisdiction to issue the impugned resolution dated

8.8.2003 and, therefore, even if, on the merits of the matter, the petitioners have less percentage of marks, yet the respondents have full authority to regulate the admission of the petitioners on the basis of merit. The only criterion is that the petitioners are required to pay U.S. $ 2000 each and the admission of the petitioners is required to be regularized by the Committee and, in fact, the Committee has given admission and the petitioners are prosecuting the study since November 2002 and, therefore, the respondents have no authority to cancel the admission of the petitioners. In support the same, the petitioners made following submissions:

9. The impugned decision is based on the earlier resolution dated 7.12.1999 as well as resolution dated 5.9.2002. It may be noted that 7.12.1999 resolution specifically refers to the judgment of the Apex Court in the case of Unni Krishnan (supra) as well as the judgment of this Court in Special Civil Application No.9942 of 1998 in the case of Parul Arya Seva Mandli (supra) which I have referred earlier in this behalf. It is the case of the petitioners that each college imparting higher education in the field of science and technology is provided 15% seats of its total intake capacity. The Central Council of Homeopathy, New Delhi, has sanctioned 100 seats for the respondent No.4-college for for the year 2002-2003. The respondent No.4-college was, therefore, entitled to fill up 15 seats on NRI or NRI sponsored seats.

9.1 It is the case of the petitioners that the decision of the Apex Court in the case of Unni Krishnan (supra) provides fee structure as well as admission procedure in private recognized/affiliated educational institutions. The said decision also provides principles of right to education, right to establish educational institutions and impart education and right to recognition/affiliation. The decision of the Apex Court also indicated that in the professional colleges 50% seats should be 'free seats' to be filled in on merit by the Government or the University and remaining 50% seats (payment seats) for candidates willing to pay the higher prescribed fee, allotment being on inter se merit. No quota for management/promoters is to be kept. The competent authority alone should conduct all admissions/common entrance examination for entire State.

9.2 It is the case of the petitioners that the

ratio-decindi of the aforesaid judgment of Unni Krishnan has been overruled by the eleven-Judge Bench of the Apex Court in the case of T.M.A. Pai Foundation (supra). The Apex Court in paragraph 36 observed as under:

9.2.(i) "36. The private unaided educational institutions impart education, and that cannot be the reason to take away their choice in matters, inter alia, of selection of students and fixation of fees. Affiliation and recognition has to be available to every institution that fulfils the conditions for grant of such affiliation and recognition. The private institutions are right in submitting that it is not open to the Court to insist that statutory authorities should impose the terms of the scheme as a condition for grant of affiliation or recognition; this completely destroys the institutional autonomy and the very objective of establishment of the institution."

9.2.A In paragraph 45, the Apex Court, in terms, did not approve the decision in Unni Krishnan case relating to the grant of admission and the fixing of the fee. In paragraphs 68 and 69, the Apex Court observed as under:

9.2.A.(i) "68. It would be unfair to apply the same rules and regulations regulating admission to both aided and unaided professional institutions. It must be borne in mind that unaided professional institutions are entitled to autonomy in their administration while, at the same time, they do not forego or discard the principle of merit. It would, therefore, be permissible for the university or the Government, at the time of granting recognition, to require a private unaided institution to provide for merit-based selection while, at the same time, giving the management sufficient discretion in admitting students. This can be done through various methods. For instance, a certain percentage of the seats can be reserved for admission by the management out of those students who have passed the common entrance test held by itself or by the State/University and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counselling by the State agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose has to be done by the Government according to the local needs and different percentages can be fixed for minority unaided and non-minority unaided and professional colleges. The same principles may be applied to other non-professional but unaided educational institutions viz. graduation and post graduation non-professional colleges or institutes.

9.2.(A)(ii) 69. In such professional unaided institution, the management will have the right to select teachers as per the qualifications and eligibility conditions laid down by the State/University subject to adoption of a rational procedure of selection. A rational fee structure should be adopted by the management, which would not be entitled to charge a capitation fee. Appropriate machinery can be devised by the State or university to ensure that no capitation fee is charged and that there is no profiteering, though a reasonable surplus for the furtherance of education is permissible. Conditions granting recognition or affiliation can broadly cover academic and educational matters including the welfare of students and teachers."

9.3 The aforesaid judgment in the case of T.M.A. Pai Foundation (supra) has been followed and the same principle is reiterated by the Apex Court in the case of Islamic Academy of Education and another vs. State of Karnataka and others, reported in (2003) 6 Supreme Court Cases 697. The learned advocate for the petitioners has relied upon paragraph 21 (page 730), paragraph 70 (page 749), paragraph 4(ii) (page 750) [wherein the Apex Court has further observed that the decision in Unni Krishnan has been overruled], paragraph 73 (page 751), paragraph 86 (page 756), and paragraph 120 (page 764). He also referred to paragraph 124 (page 765), paragraph 164 (page 775) [which provides for common entrance test and percentage of seats], paragraph 178 (page 779), paragraph 196 (page 783) [which provides that merit and merit alone should be the basis of selection for the candidates) and paragraph 218 (page 788) [wherein it is specifically stated that in T.M.A. Pai Foundation, this Court in no uncertain terms said that merit would be the first criterion for imparting professional education. It must be given full effect with the aid of these additional reasons).

9.4 In view of the aforesaid judgments of the Apex Court in the cases of T.M.A. Pai Foundation (supra) and Islamic Academy of Education (supra), the petitioners submitted that the judgment of the Apex Court in the case of Unni Krishnan (supra) is no longer good law. The petitioners, therefore, submit that the basis of the resolution is the judgment of Unni Krishnan and, once that judgment has been overruled, the Government cannot now insist upon the enforcement of the said circular in this behalf.

10. Dr. R.D. Patel, Assistant Director of Indian System of Medicine and homeopathy, has filed affidavit-in-reply dated 12.4.2004 on behalf of the respondent No.1. It is the case of the Government in the affidavit-in-reply that the respondent No.4-Instittion, while giving admission in first year B.H.M.S. Course on NRI quota, is supposed to follow the Government Resolution dated 7.12.1999 issued by the Health and Family Welfare Department as well as Government Resolution dated 16.6.1999. A copy of the said resolution has been annexed with the affidavit-in-reply. It was further stated that 15% NRI quota is fixed but while giving admission on NRI quota, certain norms are required to be followed and that norms are fixed by above referred respective resolutions and the first criterion which is required to be followed is that even if the students are given admission on NRI quota, they are supposed to secure at least 50% marks, i.e. the minimum merit criteria which is required to be followed by each institution which is giving admission in NRI quota. It was further submitted that the respondent No.4-Institution, while giving admission, has not followed the Government Resolution dated 16.6.1999 in which it is categorically mentioned that the students who have secured at least 50% marks in 12th science stream can only be considered to be eligible for giving admission i.e. the minimum qualification which is required to be followed by each institution while giving admission in NRI quota. It was stated that, in this case, admittedly, all the petitioners are not possessing the 50% marks in 12th Standard and, therefore, on this ground alone, the petitioners are not entitled to get admission in B.H.M.S. irrespective of any quota and, therefore, the petitioners are not entitled to get admission in B.H.M.S. course on merit and, therefore, even in the T.M.A. Pai's case also, the Supreme Court has held that the merit criteria of the students should not be ignored while giving admission in respective course and hence the present petitioners have not come before this Court with clean hands and have taken advantage by stating that they are sailing in the same boat though they have secured admission on NRI quota in respondent No.4-Institution. The respondent No.1 has also relied upon the order dated 10.12.2003 passed by this Court (Coram: Miss Justice R.M. Doshit, J.) in Special Civil Application No.605 of 2003 in the case of Vaishaliben Pravinsinh Chauhan, wherein, the petitioners, who have got marks less than 50%, were denied admission.

11. On behalf of the State Government, learned

Assistant Government Pleader, Miss. Mita Panchal, has appeared. Learned advocate, Mr. Mitul K. Shelat, has appeared for the respondent No.3-University. The learned advocates for the respondents have reiterated the contentions raised in the affidavit in reply filed by Dr. R.D. Patel, which I have referred to in the earlier paragraph, and the Government Resoluton referred to therein. The learned advocates for the respondents have submitted that the admission given by the College to the peitioners is contrary to the Government Resolution and without permission of the Committee. The learned advocates for the respondents have also relied upon the judgment and order of this Court (Coram: Miss Justice R.M. Doshit, J.) in support of their contention. The learned advocates for the respondents have submitted that the State Government is neither obliged to hear the students or the College before passing the resolution, nor is any principle of natural justice violated. The resolution is an administrative order in nature.

CONCLUSION

12. I have considered the submission of the learned advocate of the petitioners that the State Government has passed the impugned communication/order dated 8.8.2003 without hearing the petitioners and, therefore, it is violative of principles of natural justice. The principle of natural justice has been succinctly set out by the Apex Court in the case of D.K.Yadav (supra). The same principle is reiterated by the Apex Court in the cases of Debasis Das { [2003] 4 SCC 557} (supra) and GTC Industries Ltd. {[2003] 5 SCC 106} (supra).

13. It may be noted that the principle of 'natural justice' has been explained by various Authors:

(i) Honourable Mr. Justice C.K. Thakker on Administrative Law, [First Edition, reprinted in 1996] in Chapter 6 on pages 158 and 159.

(ii) I.P. Massey, on Administrative Law, [5th Edition 2001], in Chapter 6, at page 161, has defined 'rules of natural justice'.

(iii) Dr. S.P. Sathe, on Administrative Law, 6th Edition, in Chapter 5, at pages 164 and 165, has discussed the principles of natural justice.

(iv) Prof. H.W.R. Wade on Administrative Law, 7th Edition (1994), Chapter 13, at page 463, has considered the principles of 'procedural justice' and the principle of audi alterm partem at page

494.

(v) De Smith, on Judicial Review of Administrative Action, 5th Edition, 1995, at Chapter 8, more particularly page 401, paragraphs 8-001 and 8-0002, page 415 paragraph 8.032, also considered the principles of natural justice and also on page 486 paragraph 10.016, the learned Author has considered 'duty to act fairly'.

(vi) M.C.Jain Kagzi on the Indian Administrative Law, 6th Edition, 2002, on page 125 at para 3.5 explained 'fairness' or 'fair procedure' in administrative action.

(vii) Halsbury's Laws of England, Fourth Edition, 1973, Vol1, on Administrative Law, on page 90 at paragraph 74, also discussed the principle of 'audi alteram partem'.

I have consided this principle also over and above the judgments of the Supreme Court in the cases of D.K.Yadav (supra), Debasis Das { [2003] 4 SCC 557} (supra) and GTC Industries Ltd. {[2003] 5 SCC 106} (supra). In view of the catena of decisions and weighty commentaries of various Authors on Administrative Law, in my view, once the impugned communication/order dated 8.8.2003 passed by the State Government directly affects the career of the students, it was incumbent upon the State Government to hear the petitioners-students. The impugned decision has been taken without hearing the students as well as the college, which directly affects them. It may be noted that, since November 2002, the petitioners are prosecuting studies whereas the impugned communication/order is passed on 8.8.2003. Therefore, there is delay in passing the impugned order by the Government. This has created a great prejudice to the career of the students. In the aforesaid facts and circumstances of the case, in my view, the impugned order dated 8.8.2003 passed by the State Government is, admittedly, without hearing the petitoners whose career has been jeopardized. In my view, it is incumbent upon the State Government to hear both the students and the College Authorities before passing any order.

14. It may be noted that the resolution passed by the State Government is neither legislative action nor subordinate legislative action. By virtue of the resolution, a great prejudice has been caused to the students and their future career is jeopardized. The impugned action [passing of resolution] of the State Government, by which it determines the future of the students, is said to be a quasi-judicial nature. Thus, the determination of future of the students in such a

situation may acquire quas-judicial character and, therefore, the rules of natural justice are applicable in the present case.

15. It may be noted that the learned advocate for the petitioners has relied upon the judgment of Honourable Mr. Justice A.R. Dave, in identical fact-situation, in the case of which I have referred earlier. I have been informed by the learned advocate for the petitioners that neither the State Government nor the University has assailed the aforesaid order of this Court any further in this behalf. However, when the Government hears the petitioners as well as College Authorities, the Government and/or the Committee will also consider the ratio laid down by this Court in this behalf.

16 On behalf of the State Government, the learned Assistant Government Pleader has contended that some of the petitioners, who have secured admission on NRI seats/NRI sponsored seats, have got marks less than 50% and, therefore, they are not entitled to the admission in question. In view of the fact that the impugned resolution passed by the State Government is without hearing the students and the college and it is violative of principles of natural justice, I am not deciding the aforesaid point in the present writ petition. It will be open to the State Government or the Committee constituted by the State Government to consider this aspect after hearing the students and the college and after considering the principles laid down by the Supreme Court in the cases of T.M.A. Pai Foundation (supra) and Islamic Academy of Education (supra).

17. The resolution dated 8.8.2003 is required to be quashed and set aside as the same was passed without hearing the students as well as the college. I, therefore, direct the State Government or the Committee constituted by the State Government to hear the petitioners as well as College Authorities in this behalf. The petitioners are entitled to make representation before the Committee and the College Authorities are also entitled to make representation before the Committee in this behalf and, if need arises, the State Government can hear the petitioners as well as the College Authorities. After hearing, the State Government or the Committee may pass a short but reasoned order in this behalf.

18. In view of the aforesaid position, in my view, the contention raised by the petitioners that the resolution passed by the State Government is based on the

judgment of the Unni Krishnan (supra) and the said judgment has been overruled by the Apex Court in T.M.A. Pai Foundation case (supra), and, therefore, the impugned communication/order dated 8.8.2003, based on the said resolution, is vitiated and deserves to be quashed and set aside on this ground only, does not require to be decided at this stage. It would be open to the State Government to consider the aforesaid contention of the petitioners if the petitioners as well as the College Authorities make representation in this behalf, because, it appears that, when the State Government has passed the impugned communication/order dated 8.8.2003, the State Government was not able to consider the judgments of Apex Court in the cases of T.M.A. Pai Foundation (supra) and Islamic Academy of Education (supra), which were pronounced by the Apex Court only in August 2003. It would be better if either the State Government or the Committee may consider this latest legal position and then pass an appropriate order after hearing the petitioners and the College Authorities and that would be in the interest of the students and the College in this behalf. It is clarified that this Court is not expressing any opinion on the merit of the matter.

19. In the result, the present writ petition is allowed. The impugned Government Resolution dated 8.8.2003 is quashed and set aside. However, it will be open to the State Government to pass fresh order. If the State Government decides to pass fresh order, then the State Government shall hear the students and the college and, after considering the principles laid down by the Supreme Court in the cases of T.M.A. Pai Foundation (supra) and Islamic Academy of Education (supra), pass an appropriate order in accordance with law, within four months from today. Rule is made absolute with no order as to costs.

(K.M. Mehta, J.)

(swamy)